

Introduction

The events of September 11th brought home to the United States that, perhaps unlike any time in its past, the “tyranny of distance” could not be relied upon to protect its citizens from harm. The destruction of the World Trade Center and the attack on the Pentagon wrought countless millions in damages to those affected and to the economy of the United States as a whole. More importantly, the attacks caused the deaths of some 3,000 and injury to countless others. Many of the victims were, of course, from countries other than the United States. With the benefit of hindsight, it seems clear that an act of the magnitude of September 11th would eventually strike the United States. Still, terrorism on this scale is clearly new to the United States and the world and brings with it challenges to the law of armed conflict paradigm that has lasted since the closure of World War II. This changed environment and its impact on the existing laws of armed conflict require careful study and debate to develop insight into the future legal framework for responding to terrorism. This was the purpose of the colloquium that this book, volume 79 of the International Law Studies (“Blue Book”) series, memorializes.

In June, 2002, the Naval War College conducted a symposium on International Law and the War on Terrorism. The colloquium, organized by Lieutenant Colonel Steven Berg, JAGC, US Army, was made possible with the support of the Center for National Security Law of the University of Virginia, Charlottesville, Virginia, the Israeli Yearbook on Human Rights, Tel Aviv, Israel, the Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island, and the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island. Without the support and assistance of these organizations, the colloquium would not have been the success that it was, and this volume would not be before you as it is. Their support is greatly appreciated.

Colonel Frederick L. Borch, JAGC, US Army, and Major Paul S. Wilson, JAGC, US Army, both of our International Law Department, collaborated as editors of this volume. Their dedication and perseverance are responsible for the production and completion of this product.

A special thank you is necessary to Dr. Alberto Coll, the current Dean of the Center for Naval Warfare Studies and Rear Admiral Rodney P. Rempt, the President of the Naval War College for their leadership and support in the

planning and conduct of the colloquium and the funding for the printing of this book.

The “Blue Book” series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both US and foreign military commands. This volume on International Law and the War on Terrorism is a fitting and necessary addition to the series as the world continues to grapple with the senseless acts of terrorism common in our world today.

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Preface

The September 11, 2001 attacks on the World Trade Center and the Pentagon catapulted the United States—indeed the world—into a new war on terrorism. On September 14th, the US Congress passed a joint resolution authorizing President George W. Bush “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks . . . or harbored such organizations or persons.” On September 28th, the UN Security Council adopted Resolution 1373. It not only condemned terrorism as a threat to international peace and security, but implicitly recognized that al Qaeda’s use of commercial aircraft as weapons constituted an “armed attack” within the meaning of Article 51 of the UN Charter. In any event, on October 7, 2001, less than a month after the terrorist attacks on America, US forces began operations against al Qaeda and Taliban forces in Afghanistan.

For lawyers and academics practicing and studying international law and the Law of Armed Conflict, “9/11” and subsequent legal actions taken by the US Congress, the United Nations, and the North Atlantic Treaty Organization, meant a greatly renewed interest in a subject that had not received enough attention over the last 10 years. The same was true of military actions taken by the United States and its allies, as the nature of the fighting against the Taliban and al Qaeda in Afghanistan raised new *jus in bello* issues. Recognizing that a forum in which scholars and practitioners could meet and examine legal issues in the war on terrorism would be exciting, instructive, and rewarding, the International Law Department began planning a conference in November 2001. The result was a June 26–28, 2002 symposium called “International Law and the War on Terrorism,” and this book records the events occurring during those three days, bringing together the perspectives and ruminations of the roughly 100 conference participants.

Almost from the beginning of the symposium, a major theme emerged: that while al Qaeda’s attacks on the World Trade Center and Pentagon represented a type of armed conflict not anticipated by those participating in the conference, the Law of Armed Conflict was capable of addressing the myriad legal issues raised by terrorism after 9/11. This is not to say that the scholars and practitioners agreed on all *jus ad bellum* or *jus in bello* issues discussed; they did agree, however, that the Law of Armed Conflict and other existing

laws as they now exist provide an adequate framework for regulating armed conflict with terrorism.

The first session, titled “Jus ad Bellum,” had two presenters. Prof. Michael N. Schmitt, George C. Marshall European Center, Garmisch, Germany, began with a paper titled “Counter-Terrorism and the Use of Force in International Law.” Schmitt explored the circumstances under which a victim state may react forcibly to an act of terrorism, and concluded that “in most respects the law on the use of force has proven adequate” in countering terrorist attacks. That is, while the current “normative system developed for state-on-state conflict,” it nonetheless has shown itself to be sufficiently flexible to respond to terrorist attacks by non-state actors.

In the absence of a post-9/11 resolution from the UN Security Council, Prof. Schmitt asserted that the sole basis for the United States and its coalition partners to take action was self-defense. No advance Council authorization is required for force used in self-defense; all the U.N. Charter requires is ‘notice.’ It follows that while a state’s use of force in self-defense does not deprive the Council of its ‘right’ to respond to any terrorist attack, the Council’s failure to take action does not deprive a state of its inherent right to exercise individual or collective self-defense. In Prof. Schmidt’s view, it is “tragically self-evident” that the al Qaeda attacks on September 11, 2001 were of sufficient “scale and effects” to qualify as an “armed attack” within the meaning of Article 51 of the UN Charter. Consequently, US and coalition operations against al Qaeda in Afghanistan were a legitimate exercise of individual and collective self-defense. Self-defense requires ‘necessity’ (“a sound basis for believing that further attacks will be mounted”) and ‘imminency’ (“self-defense may be conducted against an ongoing terrorist campaign”); the use of force also must be proportional. Schmitt concluded his paper with an examination of the legality of using force against the Taliban. While he determined that the legal authority for acting in self-defense against al Qaeda was much clearer than the legal basis for using force against the Taliban, Schmitt nonetheless was satisfied that the principle of state responsibility established in the *Corfu Channel* case justified US and coalition military operations against Taliban forces in Afghanistan.

Prof. Rein Müllerson, Kings College, Univ. of London, followed Schmitt with an oral presentation of his paper, “Jus ad Bellum and International Terrorism.” In examining terrorism and the law of war, Müllerson concluded that not all terrorist attacks are contrary to jus ad bellum; if they lack a link to a state or are “relatively insignificant” in size and scope, the attacks fall outside the scope of jus ad bellum. However, any terrorist attack that does “come under” jus ad bellum (like 9/11, which Müllerson believes is an armed attack) by

definition also violates *jus in bello*. The fact, says Müllerson, that those drafting Article 51 in 1945 contemplated that only states would be conducting armed attacks does not mean that a non-state entity cannot launch an armed attack. To conclude otherwise is both illogical and ignores “current realities.” Müllerson further argued that the September 11th attacks are crimes against humanity as defined by Nuremberg Tribunals and “the statutes of international criminal tribunals recently adopted.” Like Prof. Schmidt, Prof. Müllerson also arrives at the same “bottom line:” that our existing international legal framework provides more than adequate authority to use force against terrorists.

After comments from Prof. Robert Turner and Mr. Harvey Dalton, and questions from the audience, the conference shifted from *jus ad bellum* to an examination of *jus in bello* issues. Leading off this session was Prof. Yoram Dinstein, Visiting Professor, DePaul Univ. College of Law, who talked about “Unlawful Combatancy.” Calling this topic “a matter a of great practical significance in present-day international law,” Dinstein began with the basics: that combatants are individuals who are either members of the armed forces (except religious or medical personnel) or persons who take an active part in hostilities; that noncombatants are civilians (who are not allowed to actively participate in the fighting); and that one *cannot be both* at the same time. As the US, its friends, and allies are involved in a war with terrorists who are almost by definition *unlawful* combatants, Prof. Dinstein devoted the remainder of his remarks to explaining the distinction between lawful and unlawful combatants. In Dinstein’s view, combatants must satisfy “seven cumulative conditions” to qualify as *lawful* combatants and enjoy immunity from prosecution or punishment for killing and wounding the enemy or destroying and damaging his property. They must:

- (1) Be subordinate to a responsible command (thus excluding “one-man” armies);
- (2) Wear a fixed distinctive emblem recognizable at a distance (so that the principle of distinction may be observed);
- (3) Carry arms openly (so that they will not be confused with civilians);
- (4) Fight in accordance with the *jus in bello* (so that in claiming the law’s protections if captured, a combatant must be willing himself to respect this same law);

- (5) Act within a hierarchic framework, embedded in discipline and subject to supervision by upper echelons;
- (6) Belong to a party to the conflict; and finally
- (7) Not have any allegiance (or nationality) to the Detaining Power (so that a German soldier in the French Foreign Legion would be entitled to POW status if captured while fighting in Indo-China but would not be entitled to such status if fighting in a war against Germany.)

Based on these seven cumulative conditions, Prof. Dinstein concluded that both the Taliban and al Qaeda failed to qualify for POW status, but for very different reasons. The Taliban fighters were members of regular armed forces professing allegiance to a government unrecognized by the Detaining Power. This meant that they could qualify for POW status in the same manner as De Gaulle's Free French forces were entitled to be POWs when captured by the Germans in World War II. That was not the principal reason, however, that captured Taliban fighters were not POWs. Rather, because they did not comply with virtually all of the seven factors earlier identified by Dinstein as required for POW status (e.g. the Taliban wore no uniform of any kind, much less any distinctive insignia), they were not entitled to claim POW status. Al Qaeda combatants, however, belong in an entirely different category. In contrast to the Taliban, al Qaeda combatants were irregular forces who failed to wear uniforms and who "displayed utter disdain toward the *jus in bello*." This contempt for the Law of War meant that no al Qaeda fighters were entitled to POW status. Prof. Dinstein concluded his remarks with the warning that the "constraints of the conditions of lawful combatancy must not . . . be seen as binding only on one Party to the conflict." Some American combatants, notably special forces troops and CIA agents in the field, were not wearing uniforms while in combat. Dinstein cautioned that had any US combatants in civilian clothing been captured by al Qaeda or Taliban forces, they would not have been entitled to POW status.

Sir Adam Roberts followed Prof. Dinstein. Sir Adam, a professor of international relations at Oxford, began by asking these questions: Are the laws of war "formally applicable" to the war on terrorism? If counter-terrorism operations involve "situations different" from those envisaged by the laws of war, should we still try to apply that body of law? Are terrorists entitled to POW status? If not, what "international standards apply to their treatment?" Finally, Sir Adam asked whether the laws of war should be "revised" to take

into account the “special circumstances” of the war on terrorism. Sir Adam concluded that there were “particular difficulties” in applying the laws of war to counter-terrorism. That is, while Operation ENDURING FREEDOM might look like an “ordinary” international armed conflict, “a war that has as a purpose the pursuit of people deemed to be criminals involves many awkward issues for which the existing laws of war are not a perfect fit.” With that said, the UN Security Council, states, and non-governmental organizations have all assumed that the laws of war do apply. Consequently, this reality—and considerations of “reciprocity” and “prudence”—require that the US and its coalition partners apply the law of war “to the maximum extent possible.” Professor Roberts also concluded that the US decision to deny POW status to al Qaeda combat captives was sound both as a matter of law and policy. However, he faulted the Bush administration for failing to highlight that the detainees would be accorded humane treatment in accordance with Common Article 3. Sir Adam also stressed that the United States missed an opportunity to show the world that it is scrupulous in observing the laws of war when it did not announce that all Taliban and al Qaeda detainees would be treated in accordance with Articles 45 and 75 of the 1977 Geneva Protocol I. The latter articles elaborate a range of minimum rules of protection for all those who are not entitled to POW status. Since the US treatment of the detainees comported with these two Protocol provisions, and since most nations are signatories to Protocol I, announcing that it would adhere to these Protocol provisions would have been smart public relations. Finally, Prof. Roberts opined that “there is a case for consideration of further revision” of the law of war. While rejecting the idea that existing laws of war are inadequate in the face of the “terrorist challenge,” Roberts did believe that “some modest evolutionary changes” should be examined. In Sir Adam’s view, legal issues involving “targeting, cluster bombs, and the classification and treatment of detainees” were appropriate topics, as was “the whole difficult problem of . . . suicide bombers who by definition cannot be deterred by normal means.”

After commentary from Col. Charles Garraway, Prof. Leslie C. Green, and Lt. Col. Tony E. Montgomery, and questions from the audience on *jus in bello* issues, the conference participants shifted their focus to a third topic: coalition operations. Prof. Wolff Von Heinegg, a member of the international law faculty at Europa-University in Frankfurt, Germany, presented an article on the legality of maritime interception and interdiction operations (MIO) in Operation ENDURING FREEDOM, the name given to the military operation launched in the aftermath of 9/11. In von Heinegg’s view, MIO seek to disrupt supplies for terrorist groups (especially by preventing materiel support for, and

financing of, international terrorism), eliminate terrorist command and training facilities, and capture international terrorists for the purpose of prosecuting them.

Von Heinegg first observed that the Security Council has neither required flag states to permit MIO against ships flying its flag, nor authorized the US and its coalition partners to conduct MIO. It follows that the legal basis for MIO must be individual or collective self-defense as permitted by customary international law and reflected in Article 51 of the UN Charter. But von Heinegg also argued that Resolution 1373, because it obligates all UN member states to prevent and suppress within their territories all acts of international terrorism, provides an additional legal basis for MIO. In Prof. von Heinegg's view, the clear language of Resolution 1373 acts to waive any member states's objection to MIO conducted against terrorists. The right of self-defense and Resolution 1373, taken together, provide the legal authority for the "the US and its coalition partners [to] control international shipping and aviation in order to verify the innocent status of such shipping and aviation." With that said, because the principle of proportionality applies to a state's right of self-defense, "indiscriminate implementation and enforcement of MIO covering vast sea areas" would be impermissible as disproportionate. Consequently, all MIO must be based upon "sufficient intelligence indicators . . . of conspiracies to commit, or acts of, international terrorism." Prof. von Heinegg concluded his presentation by explaining that the US and its coalition partners "are entitled to establish maritime interdiction areas" (i.e. to restrict "neutral" or third party state access to certain sea areas) for the purpose of identifying ships carrying terrorists or materiel for them. He also briefly examined the limitations imposed on MIO "by the law of naval warfare and by the law of maritime neutrality."

Ivan Shearer, Challis Professor of International Law at the University of Sydney, Australia, followed Von Heinegg with a paper titled "The Limits of Coalition Cooperation in the War on Terrorism." In Shearer's view, there were a number of obstacles to successful coalition warfare against international terrorism. First, as there is no universal definition of terrorism, each state is free to adopt its own definition. These varying domestic law definitions of terrorism are certain to make coalition efforts against terrorists more problematic, especially regarding extradition for prosecution. Second, while there are international norms of human rights, how each state interprets these norms in the detention and prosecution of terrorists is very much controlled by domestic law. For example, Article 5 of the Universal Declaration of Human Rights provides that "no one shall be subjected to . . . cruel, inhuman, or

degrading treatment of punishment.” But how this provision is viewed in the United States is quite different from how Article 5 is interpreted in the European Union. A third potential obstacle is extradition. Since there is no customary international law requirement for a state to honor an extradition request from another, bi-lateral and multi-lateral extradition treaties have been negotiated. Many of these existing treaties prohibit the extradition of their own citizens. They also prohibit the extradition of “politically motivated offenders.” In Shearer’s view, these two provisions are certain to create obstacles to the successful prosecution of terrorists. Fourth, the death penalty poses a very real obstacle, especially since it has been retained in the United States. The countries of the European Union, Australia, Canada, and New Zealand, for example, will only extradite a terrorist to the United States on the condition that any death penalty, if imposed, will not be carried out. Finally, Prof. Shearer addressed the role of the International Criminal Court (ICC) in coalition operations against terrorism. He noted that terrorism is not a crime within the jurisdiction of the ICC; it was specifically excluded out of fear that its inclusion as a crime might politicize the ICC. That said, Shearer concluded that as some acts of terrorism—such as a widespread or systematic attack against any civilian population—might constitute a crime against humanity and, as the ICC has subject-matter jurisdiction over this offense, some terrorists could be prosecuted in that forum.

After commentary by Commanders Neil Brown (UK) and Kevin O’Rourke (US), Wing Commander Paul Cronan (Australia), and Lt. Col. Jean-Guy Perron (Canada), and questions and comments from the audience and presenters, the conference moved to its next topic: The “proper” forum for “bringing terrorists to justice.” Lt. Col. Michael Newton, an Army judge advocate and faculty member at the U.S. Military Academy, and Christopher Greenwood, a professor at the London School of Economics and Political Science, presented papers on this subject.

The thrust of Newton’s presentation was that existing international law provides a sufficient framework to prevent and punish terrorism. Newton recognized, however, that the current state of the law, predicated as it is on “the voluntary efforts of sovereign states to implement and enforce international norms . . . is not a panacea” for combating terrorism. Nonetheless, after examining the Nuremberg trials, the UN tribunals for Rwanda and the Former Yugoslavia, and the International Criminal Court, Newton concludes that the creation of “a new superstructure of supranational justice”—an international terrorist tribunal—would not “materially enhance” the law. In his view, establishing an international court to prosecute terrorists is “abdicating state

responsibility to an internationalized process [and this] would be the first step toward paralyzing politicization of the fight against terrorism.”

Prof. Chris Greenwood responded that he believed that the national courts were the best forum in which to prosecute terrorists. He objected to the idea that al Qaeda members were guilty of war crimes prior to the commencement of international armed conflict in Afghanistan in mid-October 2001; rejecting the idea that there could be a war between a non-state actor and the United States prior to that time.

After commentary by Col. Manuel E.F. Supervielle, by Mr. Daniel Helle, and questions and comments from the audience, the conference moved to its final topic: “The Road Ahead.” Prof. John Murphy, Mr. James P. Terry, and Dr. Nicholas Rostow made presentations. Murphy, a professor of law at Villanova University, discussed “the application of legal lessons learned [and] review of the role of international conventions on terrorism.” Prior to examining these issues, however, Murphy identified a number of “trends” in terrorism. These include the “globalization” of terrorism,” as reflected in the worldwide expansion of the al Qaeda network of terrorists now operating in as many as 60 different countries, and the reality that September 11, 2001 signals “the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets.” Another trend is that terrorists appear to be increasingly “smarter and more creative . . . and better equipped to take advantage of the information on weapons, targets, and resources available on the internet,” and that some terrorist organizations are cooperating with each other (e.g. the IRA traveled to Colombia to assist the FARC in planning an urban bombing campaign). But Murphy also noted a “positive” trend in terrorism: the relative decline of state-sponsored terrorism when compared to the 1970s and 1980s.

With this as background, Prof. Murphy examined how international law has addressed these developments. He first stressed that international terrorism had been treated primarily as a domestic criminal law matter prior to September 11, 2001. Now, however, it seems clear that the scope and scale of al Qaeda’s attacks on the World Trade Center and Pentagon—and the US and coalition response to it in Afghanistan—have given the law of armed conflict a much greater role in combating international terrorism. But Murphy reminded the audience that international criminal law—in the form of 12 UN-related antiterrorism conventions—will also have an important role in the future.

In his view, these anti-terrorism conventions have taken a piecemeal approach to terrorism because it has been impossible to develop a

comprehensive convention against terrorism, primarily because agreeing upon a definition of terrorism has not been possible. In any event, while a comprehensive treaty might have been preferable, these individual conventions have provided much coverage, especially those negotiated in the 1990s like the *International Convention for the Suppression of the Financing of Terrorism*; in Prof. Murphy's view, all that is missing is a convention directed toward the use of weapons of mass destruction by terrorists. In short, while recognizing that responding with military force in self-defense may be increasingly necessary in the war against terrorism, Prof. Murphy's paper highlighted that international criminal law conventions will remain important and valuable tools in the struggle as well.

Jim Terry, a retired Marine Corps lawyer now serving as a Deputy Assistant Secretary at the U.S. State Department, next offered a series of observations on the Road Ahead in Afghanistan. Recognizing that the United States must use all available instruments of power, Terry provided a fascinating road map of those actions that should take place in Afghanistan over the course of the next few years. Terry noted particularly that within the next two years, the United States must help Afghanistan: move toward increased stability and prosperity; develop an emerging economy, facilitate the establishment of a national military and police force, and be prepared for the process to be long and hard.

Jim Terry then presented a legal analysis of the "legal rights" of, and "appropriate treatment" of al Qaeda and Taliban detainees held by the United States in Guantanamo Bay, Cuba. In Terry's view, two questions are central to this analysis: After the United States and its allies commenced military operations against Afghanistan in mid-October 2001, did the 1949 Geneva Conventions apply to the conflict? If so, were members of al Qaeda as a group, and the Taliban individually or as a group, entitled to POW status if captured?

Terry explained that the US government view was that the al Qaeda organization was not part of "the armed forces of a Party," or the "militias and volunteer corps forming part of such armed forces." It followed that al Qaeda was a non-state actor and its members did not qualify for POW status. As for the Taliban, Mr. Terry agreed that, as the Taliban were the *de facto* government of Afghanistan, it followed that there was an international armed conflict between the U.S. and its allies and Afghanistan. However, the Taliban's failure to require its fighters to wear uniforms or other distinctive insignia, or be subject to a command structure that enforced the law of war, meant that captured Taliban combatants also were not entitled to POW treatment. But, explained Mr. Terry, "Part II of Geneva Convention III [Relative to the Treatment of POWs]" requires humane treatment, including food, medical

attention, the opportunity to worship, and other benefits. In short, while not legally entitled to POW status, the detainees were entitled to much the same treatment afforded POWs. Jim Terry closed with a brief discussion about military commissions, and how Taliban and al Qaeda personnel who committed violations of the law of war would be subject to trial and punishment by such commissions.

Nick Rostow, General Counsel to the US Mission to the United Nations, presented “a few words about the UN and terrorism before September 11, 2001, the impact of September 11th and where the UN seems to be headed from here.” Rostow repeated a remark made recently by the Secretary General: “Terrorism against innocent civilians is clearly a bad thing and yet most of you wouldn’t be here except for acts of what are now called terrorism or what the colonial powers regarded as terrorism.” In Rostow’s view, this comment “aptly captures the tension at the UN” when it comes to terrorism. With that said, Nick Rostow believed that the events of September 11th “changed the focus of both the Security Council and the General Assembly,” and there was every reason to think that the UN would “finally . . . make progress toward addressing terrorism on the world stage.”

Comments from Messrs. Michael Saalfeld and Ronald Winfrey, and Capt. Jane Dalton followed, with discussion from conference participants. When the symposium closed shortly thereafter, all who attended better understood the complexity and difficulty involved in the challenges facing lawyers and operators in the war on terrorism.

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In editing the papers presented and transcribing the hundreds of pages of oral commentary, we have striven to be accurate and yet retain the tenor of the conference. We could not have brought this 79th volume of the International Law Studies to print without the unsung, but outstanding efforts of Ms. Susan Meyer and Mr. Matthew Cotnoir in Desktop Publishing. Nor would this volume be complete without the incredible efforts of Ms. Pat Goodrich, Ms. Wilma Haines, Ms. Kathleen Koegler, Ms. Erin Poe, Ms. Margaret Richard, and Mr. Jeremiah Lenihan in proofreading and correcting the multiple errors we surely made. Finally, a special note of thanks to Captain Jack Grunawalt, JAGC, USN (Ret.) for his willingness to again support the International Law Studies series in an effort to insure it remains the standard that it is. It is only due to these individuals’ efforts that the International Law

Department is able to bring you this volume. However, there are sure to be errors, and these are our responsibility alone.

Last but not least, we dedicate this book to Janet and Pauline, without whose support and love we would be lost.

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